

It's the Economy, Stupid: The Hijacking of the Debate Over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, Etc.)

*Kevin R. Johnson**

INTRODUCTION

The title to this conference—"Drug War Madness: Policies, Borders, and Corruption"—brings to mind many images, few of them positive. Although Mexico is not mentioned in the conference title, much of the live symposium at which this paper was originally presented discussed "drug war madness" in connection with the United States and Mexico. My contribution to the discussion will focus on the movement of people from Mexico to the United States, which is a major component of the modern intercourse between the two nations. My approach to the general topic may seem out of place here. The thrust of my remarks is that the drug trade, generally speaking, has little to do with immigration and immigrants. The same is generally true for the "war on terror," another metaphorical war often connected with immigration. I will be not be saying anything particularly sensational. Drug lords, narcoterrorists, sex trafficking, and Islamic terrorists will not play much of a role in my presentation.

My central point is that most migration to the United States has little to do with the drug war, narcoterrorism, national security, or the many other topics that this symposium touched on. Indeed, I am tired—perhaps irritated is a better word—with the constant and repeated hijacking of the debate over reform of U.S. immigration laws by resorting to hyperbole about the flow of drugs, terrorists, narcoterrorists, and the like across American

* Dean, University of California at Davis School of Law and Mabie-Apallas Professor of Public Interest Law and Chicana/o Studies; A.B. University of California, Berkeley; J.D. Harvard University. I appreciate the roles that Associate Dean Tim Canova and Professor Ernesto Hernández-López played in arranging my participation in this conference. Thanks to the editors of the Chapman Law Review for inviting me to participate. Some of the ideas expressed in this paper have been presented in inchoate form in postings on the ImmigrationProf blog, <http://lawprofessors.typepad.com/immigration/>. Law students Maryam Sayyed, Janet Kim, and Esmeralda Soría provided invaluable research assistance for this essay.

borders, particularly the U.S./Mexico border.¹ It is important for all of us to keep in mind that, for nearly as long as there has been a nation known as the United States, immigrants have been blamed for virtually every social, economic, and political ill that this country has ever faced.² From communism to health care reform, from crime to environmental degradation, from terror to drugs, immigrants have been a most convenient—and frequently employed—scapegoat. We often—indeed, regularly—forget this fundamental lesson of American history and repeat the mistakes of the nation’s well-known, and deeply regrettable, nativist past.

Unfortunately, in the United States, hyperbole and high drama often poison any attempt at reasoned discussion of the issue of immigration, especially the longstanding and continuous migration from Mexico to the United States. Perhaps most common is how some politicians and pundits often proclaim that the nation is gripped by nothing less than an “alien invasion.”³ Similarly, many observers deeply fear that even a small relaxation of U.S. border controls or any liberalization of the nation’s admissions criteria will “open the floodgates” to the unwanted—and, not coincidentally, racially, culturally, religiously, linguistically, and otherwise different—hordes of the world, as well as to drugs, terrorism, and crime.⁴ Unfortunately, it is all too infrequent that immigrants are contemporaneously credited for the positive contributions that they regularly make to U.S. society, a truly ironic oddity for a country that often touts itself as a “nation of immigrants.”

¹ See generally *infra* Part I.

² See, e.g., BENJAMIN FRANKLIN, *Concerning the Increase of Mankind, Peopling of Countries, Etc.*, in 3 THE WRITINGS OF BENJAMIN FRANKLIN 72 (Albert Henry Smyth ed., 1905) (“Why should Pennsylvania, founded by the English, become a Colony of Aliens, who will shortly be so numerous as to Germanize us instead of our Anglifying them, and will never adopt our Language or Customs any more than they can acquire our Complexion?”). See generally JOHN HIGHAM, STRANGERS IN THE LAND 300–30 (2d ed. 1988) (analyzing political history surrounding congressional passage of the national-origins quotas system in 1924); BILL ONG HING, MAKING & REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850–1990 (Stanford Univ. Press 1993) (documenting legacy of Chinese exclusion and related exclusionary immigration laws on the creation of Asian American communities in the United States); KEVIN R. JOHNSON, THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS (2004) (analyzing history of exclusion of political dissidents, racial minorities, the poor, women, the disabled, gays and lesbians, and other groups in U.S. immigration laws); LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS & THE SHAPING OF MODERN IMMIGRATION LAW (1995) (considering impacts of Chinese exclusion laws); RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS (1998) (analyzing history of exclusions of Asian Americans in U.S. immigration laws).

³ See, e.g., PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA’S IMMIGRATION DISASTER (1995). See generally Ediberto Román, *The Alien Invasion?*, 45 HOUS. L. REV. 841 (2008).

⁴ See KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 26–30 (2007).

As you might surmise from my tone, the tenor of the immigration debate is extremely frustrating for people like myself, who attempt to take immigration, U.S. immigration law, and related issues seriously. My firm conviction is that, despite what Lou Dobbs said on a nightly basis for many years on CNN,⁵ immigration is not all about drugs, terrorism, leprosy, September 11, welfare, crime, and just about every other social problem about which certain segments of the public, policy-makers, and pundits have profound—and, at times, even legitimate—worries. Rather, if we were to focus on undocumented immigration from Mexico to the United States, we would see that this migration, like migration generally, is primarily about jobs and economic opportunity.⁶ I concede that the availability of political and other freedoms in the United States, as well as the desire to reunite with family members here, provides motivation to immigrate, but economics is the magnet that, at an important level, motivates in whole and in part most decisions to journey to this country.⁷

If one accepts that fundamental principle as true, some corollaries naturally follow. Immigration generally is not part and parcel of the drug trade.⁸ Immigration generally is not pursued so that noncitizens can commit terrorist acts in the United States.⁹ Immigration generally is not accomplished so that immigrants can come to this country to engage in a crime wave.¹⁰ Immigrants generally do not come to the United States to secure public benefits, the vast majority of which they are ineligible for anyway.¹¹ Immigrants generally do not come here to have “anchor babies” so that an entire village can follow.¹²

Restrictionists regularly rail about what immigrants, the Mexican government, and U.S. “elites” conspire to bring to this

⁵ In the fall of 2009, Dobbs abruptly left CNN. See David Osborne, *CNN's Anti-Immigrant Presenter Steps Down; Lou Dobbs Earned Wrath of Minorities With Attacks on Hispanics and Obama*, THE INDEP. (London), Nov. 13, 2009, at 35.

⁶ See JOHNSON, *supra* note 4, at 119–20. As it has been historically, immigration today primarily is about the movement of labor across national borders for economic opportunity and material advancement. See also *infra* Part II.

⁷ JOHNSON, *supra* note 4, at 139.

⁸ *Id.* at 155–57.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1532–34 (1995).

¹² Nicole Newman, Note, *Birthright Citizenship: The Fourteenth Amendment's Continuing Protection Against an American Caste System*, 28 B.C. THIRD WORLD L.J. 437, 441 (2008) (“[The] threat of chain migration, pejoratively called the ‘anchor baby’ phenomenon, is the most inflammatory rhetoric that opponents of birthright citizenship employ.”) (footnote omitted).

country through immigration by reciting a massive laundry list of horrors.¹³ In my estimation, those claims are little different in kind from the claim of the “birthers” that hundreds of people who did not know each other conspired close to five decades ago to install a Black foreigner as President of the United States.¹⁴

Most fundamentally, immigration to the United States is generally about the migration of people—lawfully and not—to the United States for jobs.¹⁵ Viewing immigration as predominately an issue of labor migration in the global economy will not inflame passions as effectively or as quickly as viewing it as a drug, health, public benefits, crime, environmental, or security problem. It is not likely to seem like news, or even to seem all that worrisome to some people. Nonetheless, just because something does not spark fireworks does not mean that it is not true.

Unfortunately, the characterization of immigration as primarily about the movement of labor across national borders is much less likely to make the evening news than the sensational claims that immigrants are drug smugglers, terrorists, and disease carriers. It is this kind of sensationalism, however, that makes immigration an extremely difficult policy issue to discuss rationally in mixed company. I believe that the public debate on immigration in the United States, as well as other nations, is all-too-often more irrational than rational.¹⁶ For that reason, it is imperative that responsible people, including academics, political

¹³ JOHNSON, *supra* note 4, at 58–59.

¹⁴ The U.S. Constitution provides that “[n]o Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of the President.” U.S. CONST. art. II, § 1, cl. 5. President Obama’s eligibility for the Presidency has been repeatedly challenged on the grounds that, despite public records showing he was born in Hawaii, he allegedly was born outside of the United States. See Samuel G. Freedman, *In Untruths About Obama, Echoes of a Distant Time*, N.Y. TIMES, Nov. 1, 2008, at A21; Frank Rich, *The Obama Haters’ Silent Enablers*, N.Y. TIMES, Jun. 14, 2009, at 8; Dana Milbank, *President Alien, and Other Tales From the Fringe*, WASH. POST, Dec. 9, 2008, at A3. There is even a website devoted to the so-called “birther” movement, see <http://www.birthers.org/>, which Lou Dobbs gave mainstream credence to before his departure from CNN. See Michael Shain & David K. Li, *Dobbs Gave Up on \$9M*, N.Y. POST, Nov. 13, 2009, at 15.

¹⁵ See *infra* Part II.A.

¹⁶ See generally LEO R. CHÁVEZ, *COVERING IMMIGRATION: POPULAR IMAGES AND THE POLITICS OF THE NATION* (University of California Press 2001) (analyzing popular media coverage of immigration). One concrete example of the failure of rationality to prevail on matters pertaining to immigrants is the controversy in many states over whether undocumented immigrants should be eligible for driver’s licenses. The safety and security-related reasons for licensing all drivers on the road are compelling. See Kevin R. Johnson, *Driver’s Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213 (2004). However, increasing numbers of states are restricting driver’s license eligibility to U.S. citizens and noncitizens lawfully in the country. See *States Want to Keep Illegal Immigrants Off the Road*, NAT’L PUBLIC RADIO (NPR), Nov. 23, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=120682785>.

leaders, and the media, who participate in the public discourse over immigration take great care to fairly, reasonably, and thoughtfully discuss the issues in a balanced fashion. Hopefully, fair and rational discussions of the real issues implicated by immigration will make it easier for us to reach common ground on a deeply contentious, yet most pressing, policy area that greatly affects nothing less than real human lives.

Part I of this essay will attempt to debunk the frequently-made, but never persuasively argued, charge that U.S. immigration law and enforcement is central to the so-called “war on drugs,” as well as the “war on terror.” At most, immigration has a very limited role to play in those two metaphorical “wars.”¹⁷ Rather, the berating of immigrants and immigration for everything wrong with America is nothing more than a smokescreen to hide the true political ends of the speaker.¹⁸ The real intent of many users of inflammatory rhetoric is to bring more political heat to bear on immigration and promote a particular restrictionist political agenda. Immigrants are people who many love to hate, and if you add in their so-called involvement with drugs, crime, or terrorism, then you have the perfect enemy: the most unpopular of the unpopular.

Part II of this essay discusses how most immigration is connected, directly or indirectly, to labor migration of individuals and families and the relative economic opportunity in the United States. Family reunification is discussed as a secondary, and often related, major motivating factor for the movement of people across national borders. There are indeed legitimate issues to discuss concerning the labor aspects of immigration, including class, economic, and general social consequences of the migration of workers to the United States.¹⁹

A true dialogue about immigration must be honest, transparent, and above-board. If, for example, one is concerned with the racial, ethnic, and cultural composition of the immigrants to the United States, we should talk about that,²⁰ rather than to attempt to restrict migration from Mexico and to deceptively deny that one is racist or anti-immigrant but simply

¹⁷ See *infra* Parts I.A–B.

¹⁸ *Id.*

¹⁹ See *infra* Part II.

²⁰ See, e.g., SAMUEL P. HUNTINGTON, WHO ARE WE?: THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY 3–5 (2004). Huntington expresses special concern with the “Hispanization” of immigration and the increasing number of Mexican immigrants coming to the United States. See *id.* at 221–46. Although I do not agree, I appreciate that Huntington raises the issue of race squarely in his complaints about immigration. See Kevin R. Johnson & Bill Ong Hing, *National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 MICH. L. REV. 1347, 1350 (2005).

is “anti-illegal immigrant.” A rational and honest discussion of immigration would go a long way toward making sensible reform possible.

I. IMMIGRATION AND THE WAR ON DRUGS, THE WAR ON TERRORISM, AND THE WAR ON IMMIGRANTS

Over the last few decades, the United States has been inclined to declare metaphorical wars to politically energize the public to devote substantial resources and adopt drastic measures directed at addressing serious social problems.²¹ In the 1980s and 1990s, the nation relentlessly pursued the “war on drugs,” with many harsh—some have said draconian—measures.²² That war continues today, and although many people—disproportionately racial minorities and immigrants—have been imprisoned, the costly measures do not appear to have significantly reduced drug consumption, the drug trade, or overall availability of drugs in the United States.²³

After the tragic events of September 11, 2001, the nation embarked on another war, known as the “war on terror”²⁴—a name which evokes fear, passion, and anger. Not limited to actual armed conflict, and replete with deaths and casualties in Afghanistan and Iraq, this metaphorical war also included a set of harsh measures that disparately affected noncitizens of particular national origins, specifically Arabs and Muslims in the first instance, but had collateral consequences for virtually all noncitizens and many U.S. citizens as well.²⁵ Still, it is not certain that we as a nation are any safer today because of the security measures. Nevertheless, political leaders and pundits regularly remind us that the war on terror is nowhere near an end.²⁶

²¹ One of the first in recent memory was the “war on poverty” declared by President Lyndon Johnson in the 1960s. *See generally* BILIANA C.S. AMBRECHT, *POLITICIZING THE POOR: THE LEGACY OF THE WAR ON POVERTY IN A MEXICAN-AMERICAN COMMUNITY* (1976); HUBERT H. HUMPHREY, *WAR ON POVERTY* (1964); MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* (1989); JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1994).

²² *See infra* Part I.A.

²³ *Id.*

²⁴ *See infra* Part I.B.

²⁵ *Id.*

²⁶ *See, e.g.*, Robert Farley, *Hannity Says Obama Won't Even Use the Term "War on Terrorism,"* ST. PETERSBURG TIMES (Florida) (Politifact.com Edition), Nov. 11, 2009. The recent bomb attempt on an airline flight in December 2009 resulted in enhanced airport security measures directed at nationals of selected countries alleged to harbor terrorists. R. Jeffrey Smith & Ellen Nakashima, *Criteria Expanded for Travelers to Get More Scrutiny: Foreigners From Certain Regions or Groups Face Additional Screening,* WASH. POST, Jan. 5, 2010, at A8.

Perhaps not surprisingly, both the war on drugs and the war on terror have most directly affected people of color and noncitizens in the United States. Today, commentators often characterize immigration as a crime problem,²⁷ a security problem,²⁸ or a combination of the two.²⁹ Consequently, noncitizens and racial minorities are disproportionately affected. Indeed, noncitizens, with fewer legal protections under the U.S. Constitution and laws than American citizens, have proven to be the most vulnerable victims in the war on drugs and the war on terror.³⁰ Unlike U.S. citizens, for example, noncitizens in both metaphorical wars can be subject to criminal sanctions and deported or excluded from the United States. Both wars have resulted in massive—and record—numbers of deportations, as well as the denial of admission to many noncitizens into the country.³¹ Ultimately, many of those directly affected had nothing to do with drugs or terrorism but simply constitute collateral human damage in the “wars” on those two evils.³²

A. Crime, Immigration, and the “War on Drugs”

For all of recent memory, federal, state, and local law enforcement agencies across the United States have aggressively pursued the “war on drugs.” As politicians from diverse political persuasions embraced “tough on crime” measures, Congress and state legislatures for more than three decades have stiffened criminal penalties for drug crimes and increased law enforcement budgets. Not coincidentally, the U.S. prison population increased six-fold from 1972-2000, with about 1.3 million men incarcerated in state and federal prisons at the dawn of the new millennium.³³ As of 1997, a whopping sixty percent of federal prisoners and

²⁷ See, e.g., Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Margin: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285, 286–87 (1998); Alan D. Bersin, *Threshold Order: Bilateral Law Enforcement and Regional Public Safety on the U.S./Mexico Border*, 35 SAN DIEGO L. REV. 715, 716 (1998). See also Laurie L. Levenson, *NAFTA: A Criminal Justice Impact Report*, 27 U.C. DAVIS L. REV. 843, 856 (1994) (“[T]he U.S. criminal justice system is likely to bear the additional cost [that the North American Free Trade Agreement] will impose at least in the short term on this nation’s illegal immigration problems.”) (footnote omitted).

²⁸ See *infra* Part I.B.

²⁹ See, e.g., Brian R. Walquist, Note, *Slamming the Door on Terrorists and the Drug Trade While Increasing Legal Immigration: Temporary Deployment of the United States Military at the Borders*, 19 GEO. IMMIGR. L.J. 551, 551–53 (2005).

³⁰ See *infra* Part I.B.

³¹ *Id.*

³² *Id.*

³³ Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151, 151 (2004).

about twenty percent of state prisoners had been convicted of drug crimes.³⁴

In the early 1990s, the perception among the general public was that crime was simply out of control on the streets of urban America.³⁵ Legislators and law enforcement officers aggressively responded to this widespread public perception. In 1994, for example, President Bill Clinton, a Democrat who supported a firm anti-crime platform in his campaign for the Presidency, signed into law a comprehensive crime bill containing anti-drug measures and even authorizing the imposition of the death penalty for certain federal drug-related offenses.³⁶

Even though the available statistical data suggests that whites, Latina/os, Blacks, and Asian Americans have roughly similar rates of illicit drug use,³⁷ the “war on drugs” as it has been aggressively enforced in the United States has had devastating impacts on minority communities.³⁸ This should not be entirely surprising. In fighting the drug war, police commonly employed drug courier³⁹ and gang profiles in their investigatory activities,⁴⁰ which almost invariably directed law enforcement attention toward young African American and Latino men. Racial profiling in traffic stops on the nation’s roads and highways emerged as a central law enforcement tool in the “war on drugs.”⁴¹ Today, in cities and towns across the country, minorities persistently complain of being stopped for nothing more than “driving while Black” and “driving while Brown.”⁴²

³⁴ *Id.* at 152.

³⁵ David S. Broder, *Clinton’s Approval Rating Weakens; Poll Shows Rising Public Concern over Crime, Health Care Plan*, WASH. POST, Nov. 16, 1993, at A1.

³⁶ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1800 (1994).

³⁷ U.S. NAT’L INST. ON DRUG ABUSE, DRUG USE AMONG RACIAL/ETHNIC MINORITIES 29–58.

³⁸ MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 4–6, 81–123 (1995).

³⁹ Morgan Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U. L. REV. 843, 845 (1985).

⁴⁰ Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851, 869–76 (2002); Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749, 752 (1992).

⁴¹ Kevin R. Johnson, *U.S. Border Enforcement: Drugs, Migrants, and the Rule of Law*, 47 VILL. L. REV. 897, 902–03 (2002); Lisa Walter, Comment, *Eradicating Racial Stereotyping From Terry Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255, 258–66 (2000). See generally Floyd D. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 J. MARSHALL L. REV. 439 (2004).

⁴² See generally Kevin R. Johnson, *How Racial Profiling Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010) (analyzing how Supreme Court

Studies show that police regularly stop and search African Americans and Latina/os in larger numbers than their percentage of the general population.⁴³

Racially disparate policing has had dramatic, severe, and racially disparate consequences. Race-conscious policing invariably means disparate criminal convictions and incarceration. Not surprisingly, African Americans and Latina/os today are disproportionately represented among prison populations across the country—with prisons being one of the few institutions in American social life in which these groups are over-represented as to percentage of the general population. By 2002, around twelve percent of black men in their twenties were in prison or jail—nothing less than a shocking statistic.⁴⁴

The war on drugs also dramatically affected noncitizens in the United States. During roughly the same time period that the war on drugs escalated, “criminal aliens,” among the most reviled of all groups in the American psyche,⁴⁵ suffered punitive attacks in the halls of the U.S. Congress as well. In two pieces of immigration reform legislation in 1996, Congress expanded the criminal grounds for deportation (especially for drug offenses) and the definition of “aggravated felony,”⁴⁶ imposed mandatory detention on many noncitizens facing removal on criminal grounds, and sought to limit, if not eliminate, judicial review of removal orders of “criminal aliens.”⁴⁷

decisions in effect sanctioned racial profiling in both criminal law enforcement and immigration law enforcement).

⁴³ For example, a much-publicized 1999 study by the New Jersey Attorney General, found that these minority groups represented the “overwhelming majority of searches (77.2%).” PETER VERNIERO, ATTORNEY GENERAL (NEW JERSEY), INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 27 (1999).

⁴⁴ Pettit & Western, *supra* note 33, at 151 (citation omitted).

⁴⁵ See Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1532–34 (1995).

⁴⁶ Immigration & Nationality Act § 1101(a)(43), 8 U.S.C. § 1101(a)(43) (2006).

⁴⁷ See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000). See also Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J. L. & PUB. POL'Y 367, 450–54 (1999) (discussing “recent progress” of the Immigration & Naturalization Service in deporting criminal aliens); Nora V. Demleitner, *The Fallacy of Social “Citizenship” or the Threat of Exclusion*, 12 GEO. IMMIGR. L.J. 35, 42–45 (1997) (analyzing impact of the popular image of immigrants as criminals or terrorists). The two pieces of legislation were the Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996), and the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

A growing body of scholarship has analyzed the intersection of immigration and criminal law.⁴⁸ Besides the more punitive treatment of “criminal aliens,”⁴⁹ violation of the U.S. immigration laws has been criminalized, with increases in prosecutions for unlawful re-entry into the country resulting in a caseload crisis in the federal courts, particularly in the districts along the U.S./Mexico border.⁵⁰ Rather than simply deporting noncitizens who used fraudulent documents to secure employment, as had been the past practice, the U.S. government in recent years has increasingly pursued criminal charges of identity theft against undocumented workers and imprisoned noncitizens before deporting them.⁵¹

Although immigrants are often blamed for crime, ample evidence demonstrates that the crime rates among immigrants are no greater—and often less—than among the general population.⁵² This basic fact, however, fails to dampen the consistent attacks on “criminal aliens,” with politicians and the press often railing about the alleged crime wave created by immigrants in the United States.⁵³

B. Immigrants and the “War on Terror”

Following the tragic events of September 11, 2001, President George W. Bush declared a “war on terror.”⁵⁴ This new war had an incredible effect on noncitizens in the United States—and not just so-called terrorists.⁵⁵ With the onset of the war, record levels

⁴⁸ See, e.g., Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control, and National Security*, 39 CONN. L. REV. 1827 (2007); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003); Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

⁴⁹ See *supra* notes 45–47 and accompanying text.

⁵⁰ See JOHNSON, *supra* note 4, at 179–82.

⁵¹ See Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 30–34 (2009) [hereinafter Johnson, *The Intersection of Race and Class*] (reviewing U.S. government’s pursuit of criminal identity theft prosecutions in wake of a much-publicized raid of meat processing plant in Postville, Iowa). See, e.g., *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009) (holding, in a case involving an immigrant from Mexico, that identity theft statute requires the U.S. government to prove that the defendant knew that the identity being stolen belonged to another person rather than was fictitious).

⁵² See JOHNSON, *supra* note 4, at 155–58.

⁵³ See *id.*

⁵⁴ *President Bush’s Address on Terrorism Before a Joint Meeting of Congress*, N.Y. TIMES, Sept. 21, 2001, at B4.

⁵⁵ See Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369 (2007) (analyzing hijacking of immigration reform by national security and “war on terror” emphasis).

of deportations of noncitizens followed, including the removal of many based on relatively minor crimes; moreover, many other security-related measures had major impacts on noncitizens from Mexico and Central America,⁵⁶ almost all of whom had nothing to do with terrorism.

After September 11, 2001, the U.S. government took a variety of immigration-related measures in the name of national security.⁵⁷ Security measures in part were directed at noncitizens because a small group of noncitizens were involved in the terrorist acts of September 11.⁵⁸ The U.S. government no doubt felt encouraged to take—or at least was not deterred from taking—aggressive measures against noncitizens generally, including those for whom there was no individualized suspicion that they were involved in terrorist activities, because deference to the political branches of government on national security matters involving “aliens” has a lengthy historical pedigree.⁵⁹ For example, in *The Chinese Exclusion Case*,⁶⁰ which upheld an

⁵⁶ See Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damages Comes Home*, 52 DEPAUL L. REV. 849 (2003) [hereinafter Johnson, *September 11 and Mexican Immigrants*]; Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 CRIM. L. BULL. 550 (2004); James A.R. Nafziger, *Immigration and Immigration Law After 9/11: Getting It Straight*, 37 DENV. J. INT'L & POL'Y 555 (2009).

⁵⁷ For analysis and criticism of these measures, see, for example, Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURVEY AM. L. 295 (2002); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002) [hereinafter Cole, *Enemy Aliens*]; Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1 (2002); Victor C. Romero, *Decoupling “Terrorist” from “Immigrant”: An Enhanced Role for the Federal Courts Post 9/11*, 7 J. GENDER, RACE, & JUST. 201 (2003); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

⁵⁸ See NAT'L COMM'N ON TERRORIST ACTS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 145–253 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf> (outlining the September 11 plot).

⁵⁹ As some scholars have noted:

As far back as the Alien and Sedition Acts of 1798, and then in the early federal immigration statutes of the late 1800s, immigration law has barred and deported noncitizens from the United States on ideological and national security grounds. Noncitizens can be arrested, detained, and deported under the immigration laws with little recourse to the constitutional protections that would limit government outside of immigration.

HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 174 (2006).

⁶⁰ *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889). See generally Kevin R. Johnson, *Minorities, Immigrant and Otherwise*, 118 YALE L.J. POCKET PART 77 (2008), available at <http://yalelawjournal.org/images/pdfs/715.pdf> (summarizing the genesis of U.S. immigration law's plenary power doctrine).

1882 law excluding most immigrants from China from U.S. shores (and that remains good law),⁶¹ the Court emphasized that

[t]o preserve its independence, and give security against *foreign aggression* and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. *It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from the vast hordes of its people crowding in upon us.* The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; . . . *If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, . . . its determination is conclusive upon the judiciary.*⁶²

After September 11, fear, anger, and outrage seized the day across the United States.⁶³ The months after the horrible loss of life saw the U.S. government adopt a flurry of extraordinary policies directed primarily at Arab and Muslim noncitizens. Interrogations, arrests, detention, special registration, and selective deportations of Arabs and Muslims emerged as a central part of national security policy. For a lengthy period after September 11, preventative, indefinite detention of Arabs and Muslims became an important component of the “war on terror.”⁶⁴ Arrests, detentions, and interrogations, without access to counsel or the handing down of criminal indictments, became commonplace.⁶⁵ The U.S. government, at least initially, focused removal efforts selectively on noncitizens from nations that it designated as “harboring” terrorists,⁶⁶ identified for the most part

⁶¹ See, e.g., *Demore v. Kim*, 538 U.S. 510, 522 (2003); *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976).

⁶² *The Chinese Exclusion Case*, 130 U.S. at 606 (emphasis added).

⁶³ See Jonathan H. Marks, *9/11 + 3/11 + 7/7 = ?: What Counts in Counterterrorism*, 37 COLUM. HUM. RTS. L. REV. 559 (2006) (analyzing psychological pressures on society to act decisively, and at times overreact, in times of social stress); Adrian Vermuele, *Libertarian Panics*, 36 RUTGERS L.J. 871 (2005) (studying how law often cannot restrain the excesses of a society in panic over contemporary events).

⁶⁴ See David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753 (2004); Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767, 778–85 (2002).

⁶⁵ See Akram & Johnson, *supra* note 57, at 327–55. For cogent criticism of the Bush administration's violation of the law through these and other measures, see Raquel Aldana, *The September 11 Immigration Detentions and Unconstitutional Executive Legislation*, 29 S. ILL. U. L.J. 5 (2004).

⁶⁶ See Kevin Lapp, *Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative*, 29 N.Y.U. REV. L. & SOC. CHANGE 573 (2005); Karen C. Tumlin, Comment, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173, 1190–93 (2004).

as nations populated predominantly by Arabs and Muslims. For a time, secret deportation hearings became the norm, with the public denied the opportunity to see how its government was treating certain noncitizens.⁶⁷

Among the set of extraordinary steps taken in the name of national security, the U.S. government required “special registration” of certain Arab and Muslim noncitizens.⁶⁸ The Executive Branch justified the imposition of special registration requirements on discrete groups of noncitizens based on national origin and religion on the ground that the political branches of the federal government had “plenary power” over immigration, with little, if any, room for judicial oversight.⁶⁹ Upon voluntarily reporting, thousands of registrants found themselves placed in removal proceedings by the U.S. government; many also were detained.⁷⁰ Mass protests followed.⁷¹ Critics powerfully challenged the special registration program as impermissible racial profiling.⁷²

Although criticized, the targeting of Arab and Muslim noncitizens in various security policies flourished in the several

⁶⁷ Courts have reached conflicting decisions about the constitutionality of the blanket closure of deportation proceedings in “special interest” cases. *Compare* *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (holding that policy denying press access to hearings violated the First Amendment), *with* *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (finding policy constitutional), *cert. denied*, 538 U.S.1056 (2003). For criticism of the secret hearing procedures, see Lauren Gilbert, *When Democracy Dies Behind Closed Doors: The First Amendment and “Special Interest” Hearings*, 55 RUTGERS L. REV. 741 (2003); Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95 (2004); Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 264–67 (2005).

⁶⁸ See *Registration and Monitoring of Certain Nonimmigrants*, 67 Fed. Reg. 52,584–85 (Aug. 12, 2002) (to be codified at 8 CFR pts. 214 & 264).

⁶⁹ *Id.* at 52,585.

⁷⁰ Bill Ong Hing, *Misusing Immigration Policies in the Name of Homeland Security*, 6 NEW CENTENNIAL REV. 195 (2006).

⁷¹ See Emily Bazar, *New Battle on Civil Rights Front*, SACRAMENTO BEE, Jan. 20, 2003, at A1; Wyatt Buchanan, *Hundreds Protest INS Registration: Men From 13 Countries Sign In*, S.F. CHRON., Jan. 11, 2003, at A13.

⁷² See Hiroshi Motomura, *Immigration and We the People After September 11*, 66 ALB. L. REV. 413, 420–21 (2003); Heidee Stoller et al., *Developments in Law and Policy: The Costs of Post-9/11 National Security Strategy*, 22 YALE L. & POL'Y REV. 197, 220–22 (2004); Ty S. Wahab Twibell, *The Road to Internment: Special Registration and Other Human Rights Violations of Arabs and Muslims in the United States*, 29 VT. L. REV. 407 (2005). See also Kathryn Lohmeyer, Comment, *The Pitfalls of Plenary Power: A Call for Meaningful Review of NSEERS “Special Registration,”* 25 WHITTIER L. REV. 139 (2003) (advocating judicial review of special registration program). Various legal challenges to special registration proved unsuccessful. See *Roundahal v. Ridge*, 310 F. Supp.2d 884, 892 (N.D. Ohio 2003). See also *Kandamar v. Gonzales*, 464 F.3d 65 (1st Cir. 2006) (rejecting argument that evidence obtained through registration should be suppressed based on constitutional violations); *Ali v. Gonzales*, 440 F.3d 678, 681–82 (5th Cir. 2006) (finding in a removal case, that the special registration did not violate Equal Protection guarantee).

years after September 11, 2001.⁷³ To make matters worse, the government's harsh treatment of noncitizens appears to have encouraged violence by private citizens against both Arabs and Muslims, and those appearing to be Arab and Muslim.⁷⁴

Importantly, the post-September 11 security measures put into place by the U.S. government were built on a sturdy foundation of previous security measures directed at Arabs and Muslims.⁷⁵ For example, the definition of "terrorist activity"⁷⁶ that subjects noncitizens to exclusion and deportation from the United States has long been a part of the U.S. immigration laws and frequently has been criticized as excessively broad.⁷⁷ In the USA PATRIOT Act,⁷⁸ Congress, in the wake of September 11, further expanded that definition.⁷⁹

The impacts of the U.S. government's security measures quickly spread like wildfire beyond Arab and Muslim noncitizens.⁸⁰ They, in fact, had far-reaching consequences for virtually all immigrant communities in the United States, as well

⁷³ See generally R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201 (2004); Mariano-Florentino Cuéllar, *Choosing Anti-Terror Targets by National Origin and Race*, 6 HARV. LATINO L. REV. 9 (2003); Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45 (2003); Stephen H. Legomsky, *The Ethnic and Religious Profiling of Noncitizens: National Security and International Human Rights*, 25 B.C. THIRD WORLD L.J. 161 (2005); Thomas M. McDonnell, *Targeting the Foreign Born by Race and Nationality: Counterproductive in the "War on Terrorism"?*, 16 PACE INT'L L. REV. 19 (2004); Andrew E. Taslitz, *Racial Profiling, Terrorism, and Time*, 109 PENN. ST. L. REV. 1181 (2005). See also Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1413-15 (2002) (discussing controversy over racial profiling following security measures put into place by the U.S. government after September 11, 2001).

⁷⁴ See Muneer I. Ahmad, *A Rage Shared by All: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1265-77 (2004); Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441 (2002).

⁷⁵ See Akram & Johnson, *supra* note 57, at 301-26.

⁷⁶ Immigration & Nationality Act § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B) (2006) provides a lengthy definition of terrorist activities, which includes providing any "material" support, including financial assistance, to a "terrorist organization" as designated by the U.S. government. For criticism of the breadth of the material support provisions, as amended, see David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 8-15 (2003).

⁷⁷ See Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313, 322-27 (2000); Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1131 (1994); Michael J. Whidden, Note, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 FORDHAM L. REV. 2825, 2871-74 (2001).

⁷⁸ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections in numerous titles of U.S.C.).

⁷⁹ See Cole, *Enemy Aliens*, *supra* note 57, at 966-70; Johnson, *September 11 and Mexican Immigrants*, *supra* note 56, at 855-57.

⁸⁰ See Johnson, *September 11 and Mexican Immigrants*, *supra* note 56, at 852-70. See also Steven W. Bender, *Sight, Sound, and Stereotype: The War on Terrorism and Its Consequences for Latina/os*, 81 OR. L. REV. 1153 (2002).

as many U.S. citizens of particular national origin ancestries.⁸¹ Record numbers of deportations, aggressive enforcement of the immigration laws, new citizenship requirements for certain security-related jobs, and a general immigration crackdown affected immigrants, with the largest cohort of lawful as well as undocumented immigrants affected from Mexico.⁸² Immigration raids, security checks, and removal campaigns have resulted in many more ordinary Mexican immigrant workers, including many who simply were undocumented, being affected than real or imagined terrorists.⁸³

“Criminal aliens,” including many Mexicans and Central Americans, ultimately made up most of the collateral damage from the national security measures put into place after September 11, 2001.⁸⁴ Since then, the nation each year has set record numbers—in the hundreds of thousands—of detentions and removals of noncitizens from Latin America.⁸⁵ Few had any involvement in the least in terrorism, but were nonetheless all victims of the security and public safety measures adopted in the name of the “war on terror.”

Anti-terror measures quickly transformed into proposals to tighten the U.S./Mexico border. Indeed, September 11, 2001 marked a dramatic shift in the nature of the debate over immigration reform in the United States, with terrorism and national security coming to dominate the immigration debate. The horrible losses of September 11 halted the discussion of measures to ameliorate some of the harsh edges of immigration reforms from 1996.⁸⁶ Immigration reform, as well as a possible migration agreement that would have regularized labor migration in North America, had been the subject of serious talks between the United States and Mexican governments in the days immediately before September 11.⁸⁷

⁸¹ See Johnson, *September 11 and Mexican Immigrants*, *supra* note 56, at 852–70. See also Bender, *supra* note 80.

⁸² See Johnson, *September 11 and Mexican Immigrants*, *supra* note 56, at 852–70. See also Bender, *supra* note 80 (documenting how “war on terror” measures had adversely affected Latina/os in the United States).

⁸³ See Johnson, *September 11 and Mexican Immigrants*, *supra* note 56, at 856–65.

⁸⁴ See *id.*

⁸⁵ HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES 19–41 (2009), available at http://www.hrw.org/sites/default/files/reports/us0409web_0.pdf.

⁸⁶ Johnson, *September 11 and Mexican Immigrants*, *supra* note 56, at 866. See also Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

⁸⁷ See Johnson, *September 11 and Mexican Immigrants*, *supra* note 56, at 866–67. See generally Ernesto Hernández-López, *Sovereignty Migrates in U.S. and Mexican Law: Transnational Influences in Plenary Power and Non-Intervention*, 40 VAND. J. TRANSNAT'L

Moreover, the fear of terrorism, feeding off of a general tendency among many U.S. citizens to restrict immigration and to blame immigrants for the problems of the day, contributed to a general “close the border” mentality that still commands significant popular support in the United States. Politicians from a wide variety of political persuasions advocate enhanced border enforcement in the name of national security.⁸⁸

Along these lines, increased border enforcement on the nation’s border with Mexico in the name of the “war on terror” became increasingly popular. Among other effects, increased border enforcement exacerbates the problem of human trafficking of migrants—an industry that has grown substantially over the last decade as would-be migrants now pay more (and more) to have guides help them avoid the ever-more-stringent border enforcement obstacles put into place by the U.S. government—from Mexico.⁸⁹ Increased border enforcement had disparate impacts on Mexican nationals, as suggested by the fact that a majority of undocumented immigrants living in the United States are from Mexico.⁹⁰

As Professor Enid Trucios-Haynes observed:

Immigration dominates policy discussions in the post-September 11, 2001 world in a manner that has distorted traditional issues and concerns relating to noncitizens. To some, the perception or reality of porous U.S. borders requires the most strenuous methods of border enforcement. *In the eyes of many, immigration reform proposals since 2001 have focused exclusively on enforcement without sufficient acknowledgment of the human consequences on the noncitizens, both authorized and unauthorized, throughout our community.*⁹¹

L. 1345 (2007) (utilizing transnational analysis of immigration to examine changing conceptions of national sovereignty in the United States and Mexico).

⁸⁸ See, e.g., Peter Andreas, *A Tale of Two Borders: The U.S.-Mexico and U.S.-Canada Lines after 9-11*, at n.5–6 (The Center for Comp. Immigr. Stud.: U. Cal. San Diego, Working Paper No. 77, 2003), available at <http://www.ccis-ucsd.org/PUBLICATIONS/wrkg77.pdf> (citing comments made by Rep. Tom Tancredo (R-CO), Sen. Maria Cantwell (D-WA), Lamar Smith (member of the House Judiciary Committee) and Dan Stein (President of the Federation for American Immigration Reform)).

⁸⁹ See generally Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977 (2006) (analyzing the modern problem of trafficking human beings); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 *B.U. L. REV.* 157 (2007) (to the same effect).

⁹⁰ See JEFFREY S. PASSEL, PEW HISPANIC CENTER, *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.*, at i (Mar. 7, 2006), available at <http://pewhispanic.org/files/reports/61.pdf> (estimating that about fifty-six percent of undocumented immigrants are Mexican nationals).

⁹¹ Enid Trucios-Haynes, *Civil Rights, Latinos, and Immigration: Cybercascades and Other Distortions in the Immigration Reform Debate*, 44 *BRANDEIS L.J.* 637, 638 (2006) (emphasis added).

The Sensenbrenner bill, passed by the U.S. House of Representatives in December 2005, was one of the most extreme enforcement-only immigration reform proposals to have received serious consideration in recent years.⁹² The bill would have made, for example, the mere status of being an undocumented immigrant a felony and threatened to criminalize the providing of humanitarian assistance, broadly defined, to undocumented immigrants.⁹³ In a comment all-too-typical of the contemporary public discourse over immigration, Senator John Cornyn (R-Texas) emphasized that the debate over immigration reform “is . . . and I would say first and foremost about our Nation’s security. *In a post-9/11 world, border security is national security.*”⁹⁴ As another member of Congress put it,

*[s]ecurity is an overriding issue confronting the United States, and if we want enhanced security, illegal immigration must be stopped. In fact, illegal immigration is an addiction that the United States must break, or it will break the United States.*⁹⁵

As one member of Congress aptly observed in analyzing immigration reform in recent years:

[T]he necessary pursuit of national security should not have been used by the new majority in power to enact unrelated and radical changes in immigration laws under the guise of preventing terrorism. Unfortunately, members of Congress have abused arguments for

⁹² See Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (1st Sess. 2005). For analysis of various immigration reform proposals and their failures, see generally MARC R. ROSENBLUM, MIGRATION POLICY INSTITUTE, “COMPREHENSIVE” LEGISLATION VS. FUNDAMENTAL REFORM: THE LIMITS OF CURRENT IMMIGRATION PROPOSALS (Jan. 2006), available at http://www.migrationpolicy.org/pubs/PolicyBrief13_Jan06_13.pdf (analyzing critically then-current immigration reform proposals); T. Alexander Aleinikoff, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 2007 National Lawyers Convention of the Federalist Society, 36 HOFSTRA L. REV. 1313, 1313–14 (2008) (observing that reform proposals had failed to come up with a reliable way to reduce undocumented migration to the United States); Muzaffar Chishti, *A Redesigned Immigration Selection System*, 41 CORNELL INT’L L.J. 115 (2008) (proposing a redesigning of the contemporary U.S. immigration system); Marisa Silenzi Cianciarulo, *Can’t Live With ‘Em, Can’t Deport ‘Em: Why Recent Immigration Reform Efforts Have Failed*, 13 NEXUS 13 (2008) (analyzing reasons for the failure of immigration reform proposals); Robert Gittelsohn, *The Centrists Against the Ideologues: What are the Falsehoods that Divide Americans on the Issue of Comprehensive Immigration Reform?*, 23 NOTRE DAME J. L. ETHICS & PUB. POL’Y 115 (2009) (identifying factors contributing to divisiveness of immigration reform debate); Katherine L. Vaughns, *Restoring the Rule of Law: Reflections on Fixing the Immigration System and Exploring Failed Policy Choices*, 5 U. MD. J. RACE REL. GENDER & CLASS 151 (2005) (offering thoughts on improving the current U.S. immigration system).

⁹³ See Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 §§ 201–02, H.R. 4437, 109th Cong. (1st Sess. 2005), available at <http://thomas.loc.gov/cgi-bin/thomas>.

⁹⁴ 152 CONG. REC. S2551 (daily ed. Mar. 30, 2006) (statement of Sen. Cornyn) (emphasis added).

⁹⁵ Virgil H. Goode, Jr., *Save America: Stop Illegal Immigration*, 42 U. RICH. L. REV. 831, 831 (2008) (emphasis added).

national security to enact hundreds of radical changes in immigration laws. . . . *Instead of enacting rational immigration reform that will indeed strengthen our national security, Congress has enacted immigration changes that have very little or nothing to do with national security.* [Republican] revolutionaries “revolutionized” the American tradition of immigration but, unfortunately, did not bring revolutionary change to protecting America from terrorists.⁹⁶

C. Conclusion

Together, the dual wars on drugs and terror in the United States unfortunately have had disparate impacts on people of color and immigrants. Some commentators contend that the harsh steps pursued by the government in both wars were serious mistakes.⁹⁷ As will be explained in Part II, immigration should not primarily be thought of as about drugs, crime, or national security.

II. THE REAL ISSUES BEHIND IMMIGRATION: LABOR MIGRATION AND MORE

While the public and policy-makers chase paper tigers that deflect them from the real issues raised by immigration, immigrants, and immigration reform, there are legitimate issues that should and must be addressed. To do so, the nation needs to, at a minimum, admit that immigration generally is about labor migration—not drugs or terrorism—in an increasingly integrated global economy.⁹⁸ That, however, should not end the discussion. Indeed, there are some important issues related to labor migration that need to be addressed in thinking about immigration, immigrants, and reform of the U.S. immigration laws.

⁹⁶ Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL'Y REV. 349, 377–78 (2005) (emphasis added).

⁹⁷ See, e.g., David Miliband, *'War on Terror' Was Arong: The Phrase Gives a False Idea of a Unified Global Enemy, and Encourages a Primarily Military Reply*, THE GUARDIAN, Jan. 15, 2009, <http://www.guardian.co.uk/commentisfree/2009/jan/15/david-miliband-war-terror>; Michael Meacher, *This War on Terrorism is Bogus: The 9/11 Attacks Gave the US an Ideal Pretext to Use Force to Secure Its Global Domination*, THE GUARDIAN, Sept. 6, 2003, <http://www.guardian.co.uk/politics/2003/sep/06/september11.iraq/print>. See also COLLATERAL CONSEQUENCES OF THE WAR ON DRUGS (Am. Civil Liberties Union, Jan. 2003), available at <http://www.aclu.org/files/FilesPDFs/final%20brochure.pdf>.

⁹⁸ See Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 56 WAYNE L. REV. (forthcoming 2010) [hereinafter Johnson, *Ten Guiding Principles*].

A. The Exploitation of Undocumented Workers

Immigration, including undocumented immigration, is primarily about labor migration, a fundamental truth backed up by study after study.⁹⁹ While some noncitizens who come to the United States are fleeing civil war, political and other persecution, as well as severe poverty, and thus deserve humanitarian treatment under our laws,¹⁰⁰ most leave their native land to come to work in the country (or come to the United States to flee persecution and poverty, *and* to work).¹⁰¹ Economists appreciate that labor and capital are factors of production and necessary for a healthy domestic economy.¹⁰² The U.S. immigration laws, however, fail to adequately calibrate the admission of immigrants to the nation's labor needs.

As has long been the case, the economic and other freedoms and opportunities in this great nation serve as a beacon to people the world over. True, recent economic times have been difficult, a fact seen in the stabilization of the undocumented immigrant population in the United States in recent years.¹⁰³ Nonetheless, immigrants, generally speaking, historically have been attracted by the economic opportunities that exist in this country.¹⁰⁴ They come to work and earn more than they would in their native countries, thereby improving the quality of their lives and the lives of their families.

⁹⁹ See JOHNSON, *supra* note 4, at 131–67. See generally Marcela Cerrutti & Douglas S. Massey, *On the Auspices of Female Migration from Mexico to the United States*, 38 DEMOGRAPHY 187 (2001) (analyzing determinants regarding the migration of males and females); Douglas S. Massey et al., *An Evaluation of International Migration Theory: The North American Case*, 20 POPULATION & DEV. REV. 699 (1994) (considering theories of migration in North America); Douglas S. Massey et al., *Theories of International Migration: A Review and Appraisal*, 19 POPULATION & DEV. REV. 431 (1993) (reviewing various theories of migration).

¹⁰⁰ See, e.g., *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 160–62 (1993).

¹⁰¹ See Max J. Pfeffer, *The Underpinnings of Immigration and the Limits of Immigration Policy*, 41 CORNELL INT'L L.J. 83, 92–93 (2008) (highlighting that economic conditions in Mexico have led an increasing number of Mexicans, particularly from rural communities, to leave Mexico in search of employment in the United States).

¹⁰² See Donald J. Boudreaux, *Some Basic Economics of Immigration*, 5 J. L. ECON. & POL'Y 199, 199–200 (2009). For analysis of the overall economic impacts of immigration to the United States, see JOHNSON, *supra* note 4, at 131–37.

¹⁰³ See JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CENTER, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES (Apr. 14, 2009), available at <http://pewhispanic.org/reports/report.php?ReportID=107> (showing a recent stabilization of the undocumented population).

¹⁰⁴ See, e.g., Catherine E. Halliday, Note, *Inheriting the Storied Pomp of Ancient Lands: An Analysis of the Application of Federal Immigration Law on the United States' Northern and Southern Borders*, 36 VAL. U. L. REV. 181, 223–24 (2001) (illustrating that migrants supply a large portion of the workforce in the agricultural, garment, janitorial, construction clean-up, hotel and restaurant, and seasonal minimum wage job industries).

U.S. immigration laws and their enforcement, unfortunately, fail to allow for adequate levels of lawful migration of labor to the United States.¹⁰⁵ Specifically, they leave few opportunities for many low- and medium-skilled workers to migrate lawfully, and thus effectively encourage undocumented migration by these workers.¹⁰⁶ With few enforceable legal protections, undocumented immigrants are paid substandard wages and work under difficult, at times harsh, conditions.¹⁰⁷ Through its restrictiveness, the current system of immigration contributes to the exploitation of undocumented immigrants in the workplace.

Because immigration, in certain respects, resembles international trade,¹⁰⁸ some observers believe that foreigners should be allowed freer access to the U.S. labor market than that permitted under current U.S. law.¹⁰⁹ Arguments therefore have been made for more liberal admission of workers into the United States.¹¹⁰

Labor migration, however, is distinct from trade in the minds of many. For that reason, free labor movement does not necessarily accompany free trade arrangements between nations. For example, the North American Free Trade Agreement (NAFTA),¹¹¹ the most significant international accord among the North American nations in recent memory, does not generally address migration between the member nations, the United

¹⁰⁵ See, e.g., Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

¹⁰⁶ See Johnson, *The Intersection of Race and Class*, *supra* note 51, at 13–15.

¹⁰⁷ See generally Maria L. Ontiveros, *Labor Union Coalition Challenges to Governmental Action: Defending the Civil Rights of Low-Wage Workers*, 2009 U. CHI. LEGAL F. 103 (2009); Leticia M. Saucedo, *Three Theories of Discrimination in the Brown Collar Workplace*, 2009 U. CHI. LEGAL F. 345 (2009); Leticia M. Saucedo, *Addressing Segregation in the Brown Collar Workplace: Toward a Solution for the Inexorable 100%*, 41 U. MICH. J.L. REFORM 447 (2008); Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961 (2006). See also JOHNSON, *supra* note 4, at 119–25 (analyzing status of undocumented immigrants in U.S. labor market); Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361 (2009) (attempting to offer a framework for ensuring that certain rights are afforded undocumented workers); Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and LatCrit Theory*, 55 FLA. L. REV. 511 (2003) (analyzing the failure of labor, employment, and other bodies of law to consider the immigration status of workers).

¹⁰⁸ See Howard F. Chang, *Migration as International Trade: The Economic Gains from the Liberalized Movement of Labor*, 3 UCLA J. INT'L L. & FOREIGN AFF. 371 (1998). For analysis why immigration often is treated differently from the trade of goods and services, see Jennifer Gordon, *Explaining Immigration Unilateralism*, 104 NW. U.L. REV. (forthcoming 2010).

¹⁰⁹ Chang, *supra* note 108, at 377.

¹¹⁰ *Id.* at 377, 410–11.

¹¹¹ See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289.

States, Mexico, and Canada.¹¹² The European Union (EU), which generally permits labor migration within the member nations, started off without permitting the movement of labor across national boundaries before moving to a system in which labor migration between the EU nations is generally permitted.¹¹³

While jobs attract workers to the United States, the public response to immigration and immigrants is complicated. This, in large part, is because the migration of labor to the United States also involves the movement of human beings to the national community, who bring distinctive races, national origins, cultures, religions, languages, and colors, all of which may generate fears, concerns, and negative reactions among segments of the American public.¹¹⁴ An uneasiness with change helps to explain some of the nativist outbursts in the United States.¹¹⁵ Racism and nativism are others. It is important to remember that, historically, one of the nation's strengths has been its ability to adjust and, for the most part, integrate immigrants into U.S. society.¹¹⁶

Immigration often is said to be connected with a number of other social problems, such as health, crime, the environment, and related issues.¹¹⁷ This is in no small part because, as previously mentioned, immigration is about the movement of people. People possess many distinctive characteristics, engage in a wide variety of economic and other activities, experience and contribute to social problems, and become a part of the

¹¹² See Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937, 940–41 (1994); John A. Scanlan, *A View from the United States—Social, Economic, and Legal Change, the Persistence of the State, and Immigration Policy in the Coming Century*, 2 IND. J. GLOBAL LEGAL STUD. 79, 86–87 (1994). For analysis of regional integration in North America, see Bill Ong Hing, *NAFTA, Globalization, and Mexican Migrants*, 5 J. L. ECON. & POL'Y 87, 94–121 (2009) [hereinafter Hing, *NAFTA*]. See also Timothy A. Canova, *Closing the Border and Opening the Door: Mobility, Adjustment, and the Sequencing of Reform*, 5 GEO. J. L. & PUB. POL'Y 341, 342, 358–59, 372–74, 414 (2007) (analyzing need for economic development in Mexico to decrease migration pressures and create the necessary environment for meaningful immigration reform in the United States).

¹¹³ Hing, *NAFTA*, *supra* note 112, at 147–48. See generally BILL ONG HING, *ETHICAL BORDERS: NAFTA, GLOBALIZATION, AND MEXICAN MIGRATION* (2010).

¹¹⁴ For a famous quote illustrating this point, see Max Frisch, *Überfremdung I*, in *SCHWEIZ ALS HEIMAT?* 219 (1990) (“We wanted workers, but people came.”) (“Man hat Arbeitskräfte gerufen, und es kommen Menschen.”).

¹¹⁵ See *supra* note 2 (citing authorities). Racism helps explain some of the negative reaction as well. See *infra* Part II.E.

¹¹⁶ See generally PETER D. SALINS, *ASSIMILATION, AMERICAN STYLE* 43–60 (1997) (summarizing history of assimilation of immigrants in the United States).

¹¹⁷ See JOHNSON, *supra* note 4, at 143–60. See, e.g., ROY BECK, *THE CASE AGAINST IMMIGRATION: THE MORAL, ECONOMIC, SOCIAL AND ENVIRONMENTAL REASONS FOR REDUCING U.S. IMMIGRATION BACK TO TRADITIONAL LEVELS* 19 (1996); BRIMELOW, *supra* note 3, at 137–233.

communities in which they (and we) live, even if they are not always offered the rights of full members of the community.

What is critical for the nation and Congress to realize is that labor is central, not peripheral, to immigration to the United States. For the law to operate effectively and efficiently, the U.S. immigration laws must appropriately address labor demand. Only with that understanding will it be possible for the nation to discuss, formulate, and enact truly lasting immigration reform.¹¹⁸

B. The “New” Jim Crow

Besides a segmented labor market with undocumented immigrants exploited in one of them, there is a racial caste quality to the labor market structure in the modern United States. People of color comprise a large percentage of the undocumented population, a majority of whom are from Mexico and Central America, and these individuals often find themselves relegated to lower wages and poorer working conditions than most Americans. The result might be termed the “new” Jim Crow.¹¹⁹

Enforcement of wage and labor protections to ensure the protection of all workers would help to minimize, if not eliminate, the dual labor market structure that currently exists in the United States.¹²⁰ In any event, my point here is that the answer to the segmented labor markets most definitely is not some misguided attempt to close the borders. As recent history has proven, this is simply not possible.¹²¹ Instead, worker protections and their aggressive enforcement would do much to level the playing field and eliminate the dual labor market structure.

C. The Impacts of Immigration on U.S. Citizen Workers

Immigration has negative impacts on our lowest skilled and other workers, even though most estimates show that the impacts are relatively small.¹²² Still, the most vulnerable citizens in U.S. society—those without high school diplomas—appear to be the most economically vulnerable to immigration, specifically the migration of unskilled labor to the United States.¹²³ Politically speaking, we ignore at our peril the fears and concerns of our nation’s most vulnerable.

¹¹⁸ See Johnson, *Ten Guiding Principles*, *supra* note 98.

¹¹⁹ See JOHNSON, *supra* note 4, at 119–25.

¹²⁰ See *id.* at 125.

¹²¹ See *id.* at 172–76.

¹²² See *id.* at 146.

¹²³ See *id.*

As the U.S. immigration laws currently operate, employers are encouraged by rational economic incentives to move jobs to the unregulated, and more inexpensive, labor market.¹²⁴ Unionization of workers then becomes more difficult, especially given the limits of federal labor law in protecting the rights of undocumented immigrants to organize collectively.¹²⁵

In this vein, some restrictionists attempt to justify efforts to limit migration on the ground that immigrants adversely affect U.S. workers, especially African Americans.¹²⁶ This claim cannot be ignored. However, rather than futile attempts to close the borders, it makes more sense to protect workers, including African American workers, through wage and condition protections and enhanced educational opportunities.

Immigration also may exacerbate wealth disparities in the United States, widening the gap between the richest and the poorest in American society.¹²⁷ Tax redistribution policies might help alleviate some of that inequality.¹²⁸ Although enacting such policies is difficult, closing the borders is simply not a viable policy alternative.

D. State, Local, and Federal Tensions Over Immigration

Over the last few years, there has been much ferment over the role of state and local governments in immigration and immigrant law.¹²⁹ For example, a 2010 law passed by the

¹²⁴ See *id.* at 120.

¹²⁵ See, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140, 151 (2002) (holding that undocumented workers were not entitled to remedy of backpay for violation of their rights by employer under federal labor law). For criticism, see generally Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, The New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 *UCLA L. REV.* 1 (2003); Robert I. Correales, *Did Hoffman Plastic Compounds, Inc., Produce Disposable Workers?*, 14 *BERKELEY LA RAZA L.J.* 103 (2003); *Developments in the Law—Jobs and Borders*, 118 *HARV. L. REV.* 2171, 2224–41 (2005). See also Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 *U. MICH. J. L. REFORM* 737, 738 (2003) (“[T]he immigrant workers’ movement suffered another severe and shocking setback when the U.S. Supreme Court decided *Hoffman Plastic Compounds, Inc. v. NLRB*.”).

¹²⁶ JOHNSON, *supra* note 4, at 143–47. See, e.g., VERNON M. BRIGGS, JR., *MASS IMMIGRATION AND THE NATIONAL INTEREST: POLICY DIRECTIONS FOR THE NEW CENTURY* 224–26 (3d ed. 2003); David C. Koelsch, *Panic in Detroit: The Impact of Immigration Reform on Urban African Americans*, 5 *GEO. J. L. & PUB. POL’Y* 447 (2007).

¹²⁷ See JOHNSON, *supra* note 4, at 143–47.

¹²⁸ *Id.* at 146.

¹²⁹ A number of scholars have questioned the conventional wisdom and advocated greater state and local involvement in immigration and immigrant regulation. See, e.g., Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 *VAND. L. REV.* 787 (2008); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 *MICH. L. REV.* 567 (2008); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 *U. CHI. LEGAL F.* 57 (2007); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 *VA. J. INT’L L.* 121 (1994). See also

Arizona legislature, which sought, through a variety of means, to make “attrition through enforcement the public policy of all state and local government agencies in Arizona,” generated national controversy.¹³⁰

Part of the increased state and local involvement in immigration regulation results from what I have termed elsewhere as a “fiscal disconnect” between the revenues and costs of immigration; put simply, the bulk of the tax revenues from immigration and immigrants go to the federal government and much of the costs of immigration and immigrants are imposed on state and local governments.¹³¹ As with other effects of labor migration, this problem can be addressed through means other than closing the borders, such as revenue sharing by the federal government with state and local governments. As will be discussed, some states have pursued a strategy of securing funds

Matthew Parlow, *A Localist's Case for Decentralizing Immigration Policy*, 84 DENV. U. L. REV. 1061, 1071–73 (2007) (contending that local governments should be permitted to regulate immigration in a manner consistent with federal immigration law and policy). Other scholars have raised questions against local attempts to regulate immigration. See, e.g., Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27 (2007); Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449 (2006); Karla Mari McKanders, *Welcome to Hazleton! “Illegal” Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1 (2007); Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217 (1994); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965 (2004); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557 (2008); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001). See also Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55 (2009) (analyzing local ordinances seeking to prohibit landlords from renting to undocumented immigrants). The courts have not been entirely consistent on the role of state and local governments in the regulation of immigration and immigrants. *Compare* Chamber of Commerce v. Edmonson, 594 F.3d 742 (10th Cir. 2010) (holding that most of Oklahoma law sanctioning employers for employing undocumented immigrants was preempted by federal law) and *Lozano v. Hazleton*, 496 F. Supp. 2d 477, 517–21 (M.D. Pa. 2007) (invalidating city immigration ordinance on federal preemption grounds), with *Gray v. City of Valley Park*, 567 F.3d 976, 979–80 (8th Cir. 2009) (affirming judgment on procedural grounds that similar city ordinance was not preempted by federal law), and *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976, 979–80, 982–86 (9th Cir. 2008) (holding that Arizona law denying business licenses to employers that employed undocumented immigrant workers was not preempted by federal immigration law).

¹³⁰ Ariz. Sen. Bill 1070, Ariz. Sen. 49th Legis., 2d Sess. (2010 (as amended)). See Gabriel J. Chin, Carissa Byrne Hessick, Toni M. Massaro, & Marc L. Miller, *Arizona Senate Bill 1070: A Preliminary Report* (May 23, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1617440.

¹³¹ See JOHNSON, *supra* note 4, at 152–55. For analysis of the billions of dollars of tax revenues generated by immigrants in the United States, see Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. (2006).

from the federal government to help cover the state and local costs of immigration.

Until recently, the conventional wisdom has been that federal power over immigration is exclusive, leaving little room for state and local regulation.¹³² Nonetheless, in the last few years, a growing number of state and local governments, frustrated with the failure of Congress to enact comprehensive immigration reform, and increasingly uneasy over the real and imagined changes brought by new immigrants to their communities,¹³³ have adopted harsh measures that purport to address undocumented immigration. Class and race, as well as legitimate concerns such as the unequal distribution of the costs of immigration between the federal and state and local governments, unquestionably have influenced the passage of these measures.¹³⁴

Ever-tightening budgets experienced by state and local governments have contributed to the support for these immigration measures. Some costs imposed by immigration, such as elementary and secondary school education for undocumented students,¹³⁵ for the most part are paid by state and local governments, while the federal government reaps the bulk of tax revenues attributable to immigration and immigrants.¹³⁶ This “fiscal disconnect” contributes to state and local concern with immigration and immigrants. In the past, states such as Arizona, New Mexico, and, at times, California, have successfully sought support for the costs of immigration from the federal government.¹³⁷ Efforts to directly address the budgetary impacts of immigration are more likely to bear fruit than those devoted to closing the borders, or chasing immigrants out of the city limits.

¹³² See, e.g., *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably . . . a federal power.”) (citations omitted) (emphasis added).

¹³³ See Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1623 (2008) (questioning accounts that recent efforts of local governments to regulate immigration and immigrants was a response to the failure of Congress to pass comprehensive immigration reform). See also Rick Su, *Notes on the Multiple Facets of Immigration Federalism*, 15 TULSA J. COMP. & INT’L L. 179 (2008) (analyzing complex issues raised by local involvement in immigration and immigrant law); *supra* note 129 (citing authorities on federal versus state powers over immigration regulation).

¹³⁴ See JOHNSON, *supra* note 4, at 152–55.

¹³⁵ The Supreme Court held in *Plyler v. Doe*, 457 U.S. 202 (1982), that undocumented children generally speaking could not constitutionally be denied access to a public elementary and secondary school education. See Michael A. Olivas, *Plyler v. Doe, the Education of Undocumented Children, and the Polity*, in IMMIGRATION STORIES 197 (David A. Martin & Peter H. Schuck eds., 2005) (analyzing the case’s background).

¹³⁶ See JOHNSON, *supra* note 4, at 152–55.

¹³⁷ See *id.* at 153–54.

One report recommended that Congress should define the “appropriate spheres of legislative activity for itself and the states.”¹³⁸ This might be a helpful step. But, more immediately, Congress could do much to calm immigration tensions at the state and local levels through passing meaningful immigration reform that addresses the true causes of the undocumented migration of workers, and by directly addressing the costs of immigration through assistance to state and local governments.

E. Nativism, Racism, Hate

Unfortunately, racism and xenophobia often infect the dialogue over immigration in the United States.¹³⁹ The tone of the debate can be described as nothing less than hateful and frightening, particularly to immigrants and U.S. citizens of particular national origin ancestries. Moreover, hate crimes directed at immigrants and Latina/os have increased in recent years, as public concerns have flared over immigration.¹⁴⁰ To facilitate meaningful reform of the U.S. immigration laws, calm, respect, and a commitment to reasonable dialogue are all critically important.

Unfortunately, advocates of restrictionism often seek to inflame—not calm—anti-immigrant sentiment to build support for stringent immigration measures. The works of Samuel Huntington,¹⁴¹ Victor Davis Hanson,¹⁴² Michelle Malkin,¹⁴³ and Peter Brimelow,¹⁴⁴ exemplify the common ploy of immigrant restrictionists who seek to capitalize on public fears—racial, economic, cultural, social, environmental, and otherwise—of immigration and immigrants.¹⁴⁵ Such fast-and-loose characterization of the current state of immigration plays into, and reinforces, the oft-made dire claims of an “alien invasion” of the United States—a war-like situation in which outsiders are viewed as unwanted intruders who restrictionists frequently

¹³⁸ UNIVERSITY OF DENVER—STRATEGIC ISSUES PROGRAM—2009 IMMIGRATION PANEL, ARCHITECTURE FOR IMMIGRATION REFORM: FITTING THE PIECES OF PUBLIC POLICY 15 (2009), available at <http://www.du.edu/issues/reports/documents/2009IMMIGRATIONREPORT.pdf>.

¹³⁹ See *supra* note 2 (citing authorities).

¹⁴⁰ See *infra* notes 162–171 and accompanying text.

¹⁴¹ See generally HUNTINGTON, *supra* note 20.

¹⁴² See generally VICTOR DAVIS HANSON, MEXIFORNIA: A STATE OF BECOMING (2003).

¹⁴³ See generally MICHELLE MALKIN, INVASION: HOW AMERICA STILL WELCOMES TERRORISTS, CRIMINALS, AND OTHER FOREIGN MENACES TO OUR SHORES (2002).

¹⁴⁴ See generally BRIMELOW, *supra* note 3.

¹⁴⁵ See *supra* Part I. Blogs can be even more incendiary. See, e.g., VDARE.com, <http://www.vdare.com> (last visited Apr. 11, 2010); Michelle Malkin, <http://michellemalkin.com> (last visited Apr. 11, 2010).

claim deserve immediate, drastic, and almost invariably harsh action.¹⁴⁶

Moreover, the facts suggest that the alarm over the current level of immigration is not justified. The nation simply is not experiencing anything like an “invasion.”¹⁴⁷ Over the last decade, somewhere in the neighborhood of a million immigrants—out of a total U.S. population of more than 300 million (less than 0.5 percent)—have lawfully come each year to the United States.¹⁴⁸ Today, roughly twelve million undocumented immigrants—approximately four percent of the nation’s overall population—live in the United States.¹⁴⁹

The bottom line is that—although numerically greater than past epochs—the percentage of immigrants in the United States today is not all that different as a percentage of the total U.S. population from that in other periods of American history.¹⁵⁰ Indeed, the percentage of immigrants of the total U.S. population is equaled, and in some instances surpassed, by those seen during the early twentieth century.¹⁵¹

True, as is the case today, growing pains resulted from the sizeable flow of immigrants.¹⁵² Nonetheless, the nation ultimately more or less accomplished the integration into U.S.

¹⁴⁶ For analysis of the “alien invasion” trope commonly invoked by immigration alarmists, see ROMÁN, *supra* note 3, at 843–46. Terminology often proves critical to the framing of the immigration debate. See generally MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004) (examining emergence of “illegal aliens” in the United States); Kevin R. Johnson, “*Aliens*” and the U.S. *Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1996) (analyzing how the term “alien” to refer to noncitizens in the Immigration & Nationality Act adversely affects their treatment and effectively denies them personhood).

¹⁴⁷ See *supra* notes 1–4 and accompanying text.

¹⁴⁸ KELLY JEFFERYS & RANDALL MONGER, U.S. LEGAL PERMANENT RESIDENTS: 2007, U.S. DEP’T OF HOMELAND SECURITY 1 (March 2008), available at <http://www.dhs.gov/ximgtn/statistics/publications/yearbook.shtm>. These statistics do not include immigrants who have returned home each year; outmigration reduces the net increase to the U.S. population attributable to immigration. *Id.*

¹⁴⁹ See PASSEL, *supra* note 90, at i. Reports suggest that the lagging U.S. economy has resulted in a stabilization in the undocumented population. See PASSEL & COHN, *supra* note 103, at i.

¹⁵⁰ See Peter H. Schuck, *Alien Ruminations*, 105 YALE L.J. 1963, 1969–78 (1996) (reviewing PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA’S IMMIGRATION DISASTER* (1995) and analyzing similar claims of record highs of immigration and “invasion” of the United States by immigrants in the early 1990s).

¹⁵¹ See MIGRATION POLICY INSTITUTE, *SIZE OF THE FOREIGN-BORN POPULATION AND FOREIGN BORN AS A PERCENTAGE OF THE TOTAL POPULATION, FOR THE UNITED STATES: 1850 TO 2006* (2007), <http://www.migrationinformation.org/datahub/charts/final.fb.shtml> (last visited May 23, 2010).

¹⁵² For analysis of nativism in the early twentieth century, see HIGHAM, *supra* note 2.

society of this wave of immigrants.¹⁵³ There is no reason to believe that, in the long run, the prospects for today's immigrants are any different.

Rather than deriding immigrants and pursuing steps that make their lives miserable, government should constructively take steps to encourage immigrant assimilation, such as improving access to naturalization, increasing access to English as a second language classes,¹⁵⁴ facilitating access to higher education, and pursuing other measures that might promote immigrant assimilation.¹⁵⁵ In the end, punishing immigrants in the United States is both unfair and counterproductive since we cannot "deport them all" or keep all of them from entering the country.

Still, we as a nation cannot ignore that there is much anti-immigrant sentiment out there, which is especially vocal at times at the state and local levels. Consider the following description of an anti-immigrant rally in Hazleton, a rural town in Pennsylvania,¹⁵⁶ home of a much-publicized immigration ordinance that generated national controversy:

[T]he anger displayed at the rally—held in support of Hazleton's anti-immigration mayor, Lou Barletta—was enough to give anyone with a soul a serious case of the chills. . . . About 700 people attended the rally, where some in attendance tried to link illegal Mexican immigrants with the 9/11 attacks. Other speakers accused illegal immigrants of carrying infectious diseases, increasing crime and lowering property values. *If Alabama's late segregationist Gov. George Wallace had been present, he would have wondered who hired away his speechwriters.*¹⁵⁷

In a similar troubling vein, the mayor of Valley Park, Missouri, which enacted an immigration ordinance similar to Hazleton's,¹⁵⁸ complained that: "You got one guy and his wife

¹⁵³ See generally SALINS, *supra* note 116 (summarizing assimilation of immigrants into U.S. society over history).

¹⁵⁴ See JOHNSON, *supra* note 4, at 188–93.

¹⁵⁵ See *id.* For example, allowing undocumented immigrants to be eligible to secure driver's licenses would help them feel safer and more secure in our society. See *supra* note 16 (citing authorities).

¹⁵⁶ See *Lozano v. Hazleton*, 496 F. Supp. 2d 477, 554 (M.D. Pa. 2007) (invalidating Hazleton's immigration ordinance on the grounds that it was preempted by federal law).

¹⁵⁷ Mike Seate, *Rage Over Illegals Brings '60s to Mind*, PITT. TRIB. REV., June 7, 2007, at B1 (emphasis added). See, e.g., John Keilman, *Hispanics Rue City's New Rules*, CHI. TRIB., Oct. 29, 2006, at C3 (reporting that Latina/os feel under attack by local ordinances like Hazleton's); Michael Powell & Michelle Garcia, *Pa. City Puts Illegal Immigrants on Notice*, WASH. POST, Aug. 22, 2006, at A3 (to same effect).

¹⁵⁸ See *Gray v. City of Valley Park*, 567 F.3d 976 (8th Cir. 2009). For some background on the Valley Park ordinance, see Sarah E. Mullen-Domínguez, Comment, *Alienating the Unalienable: Equal Protection and Valley Park, Missouri's Illegal Immigration Ordinance*, 52 ST. LOUIS L.J. 1317 (2008). See also Oliveri, *supra* note 129

that settle down here, have a couple kids, and before long you have *Cousin Puerto Rico and Taco Whoever moving in.*¹⁵⁹ Similar examples abound. Joe Arpaio, Sheriff of Maricopa County, Arizona, popularly known as “America’s Toughest Sheriff,” has pursued controversial immigration and other law enforcement policies—such as forcing detainees to wear pink underwear—that regularly draw the ire of the civil rights and immigrant communities.¹⁶⁰ The racially-tinged, anti-Mexican, anti-immigrant campaign culminating in the landslide passage of California’s Proposition 187, a measure that, among other things, denied undocumented immigrant children access to the public schools and would have required school teachers, administrators, police, and other local employees to report suspected undocumented immigrants to federal authorities, was nothing less than an anti-immigration landmark of the 1990s.¹⁶¹

As this suggests, racism to some degree influences the immigration debate. To make matters worse, as anti-immigrant rhetoric escalated in the last few years, along with the national debate over immigration reform, hate crimes against Latina/os have gone up.¹⁶² In 2008, Latino immigrants were killed in vicious attacks in rural Pennsylvania and suburban New York,¹⁶³ two locales that in recent years had seen the emergence of visible Mexican immigrant communities. The facts surrounding the killing of a lawful Ecuadoran immigrant, Marcelo Lucero, in Long Island in 2008 are deeply troubling.¹⁶⁴ A group of young men allegedly began the events of a hate-filled evening with the statement: “Let’s go find some Mexicans.”¹⁶⁵ The *New York*

(discussing housing ordinances prohibiting rentals to undocumented immigrants). Importantly, most people born in Puerto Rico are U.S. citizens. Lisa Napoli, *The Legal Recognition of the National Identity of a Colonized People: The Case of Puerto Rico*, 18 B.C. THIRD WORLD L.J. 159, 176–80 (1998) (summarizing U.S. citizenship rules for residents of Puerto Rico).

¹⁵⁹ Kristen Hinman, *Valley Park to Mexican Immigrants: “Adios, Illegals!”*, RIVERFRONT TIMES, Feb. 28, 2007, <http://www.riverfronttimes.com/content/printVersion/204874> (emphasis added).

¹⁶⁰ See William Finnegan, *Sheriff Joe*, NEW YORKER, July 20, 2009, at 42; Jacques Billeaud, *Thousands Protest US Sheriff’s Immigration Efforts*, EL PASO TIMES, Jan. 17, 2010; JJ Hensley, *Activists Aim to Continue Fight Despite Election results*, ARIZONA REP., Nov. 7, 2008, at 1.

¹⁶¹ See Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California’s Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995) (analyzing the role of race in the passage of Proposition 187).

¹⁶² See U.S. DEPT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, HATE CRIME STATISTICS 2007 (2008), available at http://www.fbi.gov/ucr/hc2007/table_01.htm.

¹⁶³ See *A Death in Patchogue*, N.Y. TIMES, Nov. 11, 2008; Sean D. Hamill, *Mexican’s Death Bares a Town’s Ethnic Tension*, N.Y. TIMES, Aug. 5, 2008, at A12; Regna Medina, *Attack in Shendoah Follows Immigrant’s Fatal July Beating*, PHIL. DAILY NEWS, Sept. 17, 2008, at 3.

¹⁶⁴ See *A Death in Patchogue*, supra note 163.

¹⁶⁵ See *id.*

Times later reported: “Every now and then, perhaps once a week, seven young friends got together . . . to hunt down, and hurt, Hispanic men. They made a sport of it, calling their victims ‘beaners.’”¹⁶⁶

The increase in hate crimes against Latina/os appears to be tied to the heated, at times hateful, public debate regarding immigration, which has included the scapegoating of immigrants and Latina/os for social ills ranging from crime to environmental degradation to destroying “American culture.”¹⁶⁷ It hardly seems mere coincidence that hate crimes against Latina/os are on the rise at the same time there has been an overheated debate about immigration and immigrants, and immigrants have been blamed for just about every social problem imaginable.¹⁶⁸

Consider the specific context surrounding the hate murder of Marcelo Lucero. In Long Island, New York, the local county executive had railed against undocumented immigrants for months.¹⁶⁹ Tempers flared and a gang of teenagers subsequently killed a Latino immigrant. Similarly, earlier in 2008, in Shenandoah, Pennsylvania, a group of young men beat to death an immigrant from Mexico.¹⁷⁰ Not that long before, tensions ran high with passage of the anti-immigrant ordinance (which a court enjoined) in Hazleton, a rural Pennsylvania town about twenty miles away.¹⁷¹

The local immigration measures serve as a bellwether for the racism that generally influences the formation of the immigration and immigrant laws and their enforcement. The animus, which often is rawer at the local level, since it tends to be less sanitized than the debate in Washington, D.C., almost inexorably animates some of the debate over immigration reform at the national level and influences national immigration law

¹⁶⁶ See Cara Buckley, *Teenagers' Violent 'Sport' Led to Killing, Officials Say*, N.Y. TIMES, Nov. 21, 2008, at A26.

¹⁶⁷ See ANTI-DEFAMATION LEAGUE, IMMIGRANTS TARGETED: EXTREMIST RHETORIC MOVES INTO THE MAINSTREAM (2008), available at http://www.adl.org/civil_rights/anti_immigrant/Immigrants%20Targeted%20UPDATE_2008.pdf; SOUTHERN POVERTY LAW CENTER, THE YEAR IN HATE, 2007 (2008), <http://www.splcenter.org/intel/intelreport/article.jsp?aid=886>. During the presidential campaign, Senator (later President) Obama criticized the scapegoating of immigrants and the rise in hate crimes against Latina/os. See Albor Ruiz, *Bigots Show True Colors in Attacks on Immigrants*, DAILY NEWS (New York), Feb. 3, 2008, at 42.

¹⁶⁸ See *supra* notes 139–161 and accompanying text.

¹⁶⁹ See *The High Costs of Harsh Words*, N.Y. TIMES, Nov. 14, 2008, at A32.

¹⁷⁰ See Medina, *supra* note 163.

¹⁷¹ See *supra* notes 156–157 and accompanying text. After a jury acquitted the defendants on the most serious charges, the U.S. government brought a hate crime prosecution, along with charges against local police, for a cover-up of the crime. See Sean D. Hamill, *Federal Charges Are Filed In Killing of Immigrant*, N.Y. TIMES, Dec. 16, 2009, at A27.

and policy. For example, despite its judicial invalidation, Proposition 187, with anti-Mexican sentiment at its core,¹⁷² led to aggressive federal action to tighten the border and resulted in legislation that limited benefit eligibility for lawful immigrants¹⁷³ and dramatically increased noncitizen detention and deportation.¹⁷⁴ Because such measures fail to go to the root of undocumented immigration, undocumented immigration continues.

CONCLUSION

There are unquestionably many important issues to discuss concerning immigration to the United States. Many of them are not altogether easy to answer. Nonetheless, these are precisely the questions that do not get addressed when we are deceived by fiery rhetoric that alleges that drugs, terrorism, and [fill in the blank with your favorite social ill] are at stake when we discuss immigration. The nation, however, suffers when the debate is hijacked into realms far afield from the core issues truly at stake in immigration reform.

Although drugs and terrorism are worthy of concern, they should not be the *primary* concerns when it comes to immigration. The nation does a serious disservice to both itself and the issue when it forgets that simple fact and ventures into previously charted waters that have taken us into some of the most sordid chapters of U.S. history.¹⁷⁵ Indeed, I do not think that it will be long before it will become the conventional wisdom that the Bush administration's "war on terror"—complete with mass detentions, removals, special registration, and even torture—was a mistaken endeavor, much like the Japanese internment during World War II or the Mexican "repatriation" during the Great Depression.¹⁷⁶ The same is true for the "war on drugs," with its devastating impacts on minority and immigrant communities.

The time is ripe for a sober discussion of immigration reform. To do so, we must ensure that we focus on the true issues at stake, not the demons of immigration that inflammatory and

¹⁷² See JOHNSON, *supra* note 4, at 150–55, 193. See also *supra* notes 132–134 and accompanying text.

¹⁷³ See JOHNSON, *supra* note 4, at 150–55, 193.

¹⁷⁴ See *supra* Part I.A.

¹⁷⁵ See *supra* note 2 (citing authorities).

¹⁷⁶ See generally FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S* (rev. ed. 2006); Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror,"* 26 PACE L. REV. 1 (2005).

insensitive talk often seeks to capitalize on and which frames much of the modern public discourse over immigration.